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Supreme Court, U.S.
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In the Supreme Court of the United States

LINDA METRISH, WARDEN,
Petitioner,

v

DANIEL NEWMAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the Sixth Circuit on federal habeas review applied a legal rule ("reasonable speculation") that has not been squarely established by this Court—and which conflicts with this Court's rule in *Jackson v. Virginia*—whether the Sixth Circuit erred in granting habeas relief when the State court's decision applied the *Jackson* standard and found there was sufficient evidence.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published. *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008). Pet. App. 1a-19a. The Order of the United States District Court for the Eastern District of Michigan, Southern Division granting the petition is unpublished. Pet. App. 20a-45a. The Michigan Court of Appeals' decision is unpublished. Pet. App. 47a-52a.

JURISDICTION

The federal district court reviewed the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following the grant of the petition, the Warden appealed to the Sixth Circuit. The Sixth Circuit, in an opinion filed October 6, 2008, affirmed the grant of the petition. The Warden filed a petition for rehearing and suggestion for rehearing en banc, which were denied on February 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The statutes involved are 28 U.S.C. § 1254(1) and the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254(d)(1) of the AEDPA provides that an application for a writ of habeas corpus:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim. . . resulted a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

INTRODUCTION

The Sixth Circuit applied a rule never squarely established by this Court and which conflicts with this Court's decision in *Jackson v. Virginia*.[1] The Sixth Circuit's rule that "reasonable speculation" is insufficient to support a conviction undermines this Court's analysis in *Jackson* that allows a jury to convict based on reasonable inferences from the evidence. This rule, which was adopted by the Sixth Circuit in 1981, has not been applied by any other circuit.

The Sixth Circuit, like the district court, also failed to accord the State court decision the deference required under the AEDPA as interpreted by this Court in *Williams v. Taylor*.[2] Consideration by the Court is necessary to secure and maintain uniformity of this Court's decisions.

The State court applied the rule of *Jackson* in a reasonable manner under AEDPA and *Williams v. Taylor*, and the Sixth Circuit, and the district court, improperly substituted their own independent judgment for that of the State court in granting habeas relief. Moreover, as articulated by the dissent from Judge Sutton in Sixth Circuit, there was ample evidence in this case that showed that Daniel Newman was the killer. Pet. App. 12a.

Notably, this Court recently granted a writ of certiorari in *McDaniel v. Brown* (No. 08-559) involving the Ninth Circuit's analysis of a sufficiency of the evidence claim. Granting the petition for certiorari in this case is likewise necessary not only for the reasons

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[1] *Jackson v. Virginia*, 443 U.S. 307 (1979).

[2] *Williams v. Taylor*, 529 U.S. 362 (2000).

stated above, but also because the Sixth Circuit's decision implicates the State's ability to uphold jury convictions in criminal cases that are based on circumstantial evidence. Reliance on such evidence by a jury is both permissible and commonplace. This particular proceeding is of great importance to the State of Michigan. Newman was convicted of murder and, unlike most cases in which habeas relief is granted, the Sixth Circuit's finding that the evidence was insufficient precludes retrial on the charges.

The State of Michigan notes that it is filing three other petitions for certiorari contemporaneously with this petition. See *Prelesnik v. Avery,* (09-___); *Berghuis v. Thompkins*, (09-___); and *Berghuis v. Smith*, (09-___). All four are murder cases, all published, all reaching disposition in February 2009, in which the State of Michigan contends the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA. These cases evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply AEPDA. This failure has dramatic consequences for this case, by wrongly vacating Newman's murder conviction. This Court should grant this petition.

STATEMENT

This is a habeas case involving the February 1992 murder of Harry Chappelear. The physical evidence recovered from the murder scene indicated that Chappelear was blasted off of his couch by a 12-gauge shotgun fired by a person standing in the foyer of Chappelear's home. Chappelear was then shot no less than eight times with a 9-millimeter handgun. Tr. 2/25/93, pp 108-119. The prosecutor's theory was that Chappelear was shot and killed during a robbery of his home and that Newman participated in Chappelear's

killing. Newman's defense was a claimed alibi. Newman did not testify.

There was abundant evidence, which linked Newman to the crime. It was uncontradicted that Newman owned one of the murder weapons (the 9-millimeter handgun). Pet. App. 12a. Five months before the murder, Newman purchased a 9-millimeter handgun. Tr. 2/25/93, pp 167-180. The firearms expert testified that this 9-millimeter handgun conclusively matched a spent cartridge recovered from the scene and at least one of the bullets recovered from Chappelear's body. Tr. 2/25/93, pp 5-41, 44-79; Pet. App. 12a. One witness saw a similar handgun in Newman's laundry hamper just a week or two before the murder. Tr. 3/3/93, pp 67-69; Pet. App. 12a-13a.

There was also evidence that linked Newman to an abandoned gym bag that contained the tools of the murder. The bag contained not only Newman's 9-millimeter handgun, but also a 12-guage sawed-off shotgun with tape on it, a ski mask, a blue jean jacket, gloves, and a set of walkie-takies. Pet. App. 13a. Evidence showed that Chappelear was shot not just with Newman's handgun, but also with a 12-guage shotgun, and the gym bag contained a 12-guage sawed-off shotgun. The murderer had cut the shotgun's wooden stock and iron barrel and had wrapped the handle with duct tape. When the police investigated Newman's home, they discovered duct tape similar to the tape wrapped around the shotgun's handle, a hacksaw with wood in the blade's teeth, and a pile of wood and iron shavings on a workbench in his garage. Tr. 3/2/93, pp 27-28, 106-110; Pet. App. 13a-14a.

Also discovered from Newman's home was twine visually and microscopically matching twine that was attached to the gym bag. Tr. 3/2/93, pp 21-22, 79-87; Pet. App. 13a.

Hair found on the ski mask was similar in all measurable characteristics to Newman's hair and the hair of one of Newman's dogs. The police laboratory scientist testified that his identifications regarding these hair samples were the strongest conclusions, as far as identification, that he could make within his field of expertise. Tr. 3/2/93, pp 186-218; Pet. App.13a-14a.

Debris found on the blue jean jacket in the gym bag visually and chemically matched a drywall compound recovered from the car Newman (who was a drywaller) was using on the day police arrested him. Tr. 3/2/93, pp 88-105, 156-157; Tr. 3/3/93, pp 23-24; Pet. App. 13a-14a.

There was evidence that Newman knew Chappelear and had visited his home at least once in the months before the murder. Pet. App. 13a.

Also, evidence was presented that Newman told one witness that he wanted to rob some drug dealers, told her that he "wanted guns, drugs, money, anything that he could use," and implored her, on a daily basis, for names and addresses of potential targets. Tr. 3/3/93, pp 70-75; Pet. App. 13a-14a. There was evidence that Newman frequently used marijuana, knew that Chappelear was a drug dealer, and had purchased drugs from him before. Tr. 3/3/93, pp 6-16, 25-27, 70; Pet. App. 14a. The hiding place where Chappelear stored marijuana (his freezer) had been left open for some time when his body was found. Tr. 2/24/93, pp 45-46, 57, 63, 78; Pet. App.14a.

There was also testimony the Chappelear had made a pass at Newman's girlfriend in Newman's presence sometime before the murder and further that Newman was jealous and possessive. Tr. 3/3/93, pp 25-30, 70.

Newman claimed he had spent the night of the murder at the bar where his girlfriend worked. The testimony of the defense witnesses, however, was vague and of little value, with one witness not recalling which day of the weekend Newman was purportedly at the bar and another admitting that she did not have any idea if he was there on February 27 or 28, 1992, or whether he was there on any particular given weekend. Tr. 3/4/93, pp 62-63, 88-89. However, several prosecution witnesses who were present at the bar that night testified that although they could not recall whether Newman was present that night they did recall that Newman's girlfriend repeatedly asked them to tell police and Newman's attorney that Newman was there. Tr. 3/4/93, 133-139, 151-157, 184-188, 192; Pet. App. 14a.

Based on all the evidence presented at trial, a jury convicted Newman of first-degree murder and possession of a firearm during the commission of a felony (felony-firearm). For his crimes Newman was sentenced to life in prison plus two years for the felony-firearm conviction. Following the discovery of an inadvertent procedural error, the trial court correctly vacated the first-degree murder conviction, entered a conviction for second-degree murder, and resentenced Newman to a term of 40-to-80 years in prison.

In his direct appeal, the Michigan Court of Appeals, without dissent, rejected Newman's contention that there was insufficient evidence to convict. Pet. App.

48a-50a. The Michigan Supreme Court denied Newman's application for leave to appeal. Pet. App. 46a.

Newman then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he alleged that there was insufficient evidence to support his convictions. The State of Michigan answered the petition. The federal district court granted habeas relief, concluding that the State-court's decision was an unreasonable application of clearly established federal law. Pet. App. 20a-37a.

The State of Michigan appealed to the Sixth Circuit. Two judges of the Sixth Circuit panel, like the district court judge, ruled in a published opinion that the State court unreasonably applied clearly established law. The other judge on the panel dissented, applying AEDPA deference to the State court and noting that "ample evidence" showed Newman was the killer. Pet. App. 1a-19a.

The State of Michigan filed a petition for rehearing and a suggestion for rehearing en banc, which was denied.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted because:

1. The Sixth Circuit applied a rule not squarely established by this Court, a rule which conflicts with this Court's rule announced in *Jackson*.

2. Even correctly applying the *Jackson* rule, the Sixth Circuit failed to accord the State court's decision the two levels of deference required in reviewing sufficiency claims on federal habeas.

Over a well-reasoned dissent, the Sixth Circuit affirmed the district court's judgment granting the petition for writ of habeas corpus on the grounds that there was insufficient evidence to sustain Newman's convictions.

1. **The Sixth Circuit applied a legal rule that has not been squarely established by this Court and that conflicts with this Court's decision in *Jackson v. Virginia*.**

On habeas corpus review, a State court decision shall be honored unless the State court unreasonably applied a rule announced by the United States Supreme Court.[3] The applicable rule or standard for reviewing a sufficiency-of-the-evidence claim was set forth by this Court in *Jackson v. Virginia*.[4] In *Jackson*, this Court held that in reviewing sufficiency claims, the relevant question is whether – after viewing all of the evidence in the light most favorable to the prosecution – *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The Court emphasized that it is the trier of fact's responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. The Michigan Court of Appeals applied the *Jackson* rule.

But upon federal court habeas review, when analyzing Newman's sufficiency claim, two judges of the Sixth Circuit panel interposed a rule that was neither drawn from *Jackson* nor from any other Supreme Court

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[3] 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 404-405 (2000).

[4] *Jackson v. Virginia*, 443 U.S. 307 (1979).

case. These judges drew a distinction between constitutionally sufficient evidence and a jury conclusion based on what they termed a "reasonable speculation" and then held that the evidence did not meet the *Jackson* standard.

A rule holding that a jury's "reasonable speculation" is insufficient to support a conviction is to be found nowhere in *Jackson* or in any subsequent Supreme Court case following *Jackson*. The term "reasonable speculation" first appeared in a 1981 habeas case before the Sixth Circuit in *Fuller v. Anderson*.[5] The term was repeated in several pre-AEDPA Sixth Circuit habeas cases involving sufficiency claims. It was then apparently abandoned until 2006, when it was resurrected in *Brown v. Palmer*[6] and reiterated in *Parker v. Renico*,[7] and then again in this case.

Thus, while the rule was established in *Jackson* that a jury may draw a reasonable inference, a rule was applied by the Sixth Circuit panel that a jury may not, however, reach a conclusion on the basis of "reasonable speculation." The Sixth Circuit's rule of "reasonable speculation" is itself a contradiction in terms.

The word "reasonable" is an integral part of the *Jackson* formula, as well as the standard of review mandated by the AEDPA. The primary task of a federal habeas court is to determine whether the State courts reasonably applied Supreme Court law in examining what reasonable jurors could conclude.

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[5] *Fuller v. Anderson*, 662 F.2d 420 (6th Cir. 1981), cert. den. 455 U.S. 1028 (1982).

[6] *Brown v. Palmer*, 441 F.3d 347 (6th Cir. 2006).

[7] *Parker v. Renico*, 506 F.3d 444 (6th Cir. 2007).

The word "speculation," however, is generally used in habeas cases as well as in other contexts in a somewhat pejorative sense, as it was in *Strickler v. Greene*, when this Court held that "mere speculation" that some exculpatory material may have been withheld was unlikely to establish good cause for a discovery request on collateral review.[8]

This Court in *Jackson* did not use the phrase "reasonable speculation." Nor has the phrase been used by any subsequent case from this Court or adopted by any other circuit. Nevertheless it has been used by the Sixth Circuit in four cases—all habeas cases granting relief on sufficiency claims.

The "reasonable *inference*" rule established in *Jackson* both recognized and was based on the role of the jury:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts**. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to

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[8] *Strickler v. Greene*, 527 U.S. 263, 286 (1999).

> the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.[9]

Clearly there is a difference between an inference and speculation. An inference is defined as "the act or process of deriving logical conclusions from premises known or assumed to be true" whereas speculation is a "conclusion, an opinion, or theory reached by conjecture." [American Heritage College Dictionary, Third Edition, 1997].

Moreover, the Sixth Circuit's "reasonable speculation" rule erroneously diverts a habeas court's focus from the appropriate constitutional inquiry. It does this by permitting a court to ask the wrong question, a point that was duly noted in the Sixth Circuit's dissent:

> The majority may be right that the evidence at trial "supported a host of permissible inferences," Maj. Op. at 4 — some indicative of guilt, some perhaps not. But this is the answer to the wrong question, as *Jackson* asks only whether the jury could have convicted, not whether the evidence supported no other possibility. [Pet. App. 14a-15a]

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[9] *Jackson*, 443 U.S. at 319 (emphasis in bold added and emphasis in italics original)(citations omitted).

By interposing a "reasonable speculation" component into its review the Sixth Circuit broadens the scope of review beyond the question whether *no* rational trier of fact could have found proof of Newman's guilt beyond a reasonable doubt. The Sixth Circuit's rule permits it to grant habeas relief merely because the evidence did not exclude every possibility of innocence. Using this method of analysis, the Sixth Circuit thus enlarges the standard set forth in *Jackson* and allows that Court to perform its own subjective review of the legitimacy of the jury verdict de novo. But this is neither the function nor role that is to be performed by a federal habeas court.

This Court recently reaffirmed in *Knowles v. Mirzayance* that the federal courts in habeas corpus cases are not to apply legal rules not clearly established by Supreme Court decisions.[10] The Sixth Circuit's finding that the Michigan courts unreasonably applied the *Jackson* standard based on the panel's application of a "reasonable speculation" rule should not be allowed to stand.

2. **The Sixth Circuit failed to accord the State court's decision the two levels of deference required in reviewing sufficiency of the evidence claims on federal habeas review.**

Under AEDPA, a federal court may grant a writ of habeas corpus only if the State courts ruled in a way contrary to, or involving an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.[11]

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[10] *Knowles v. Mirzayance*, 556 U.S. __ (2009)(citing cases).

[11] 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 404-405 (2000).

This Court has held that a State-court decision is an unreasonable application of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case."[12] When assessing reasonableness, "a federal habeas court may not grant a writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly."[13] Rather, that application must also be objectively unreasonable.[14]

28 U.S.C. § 2254(d) thus imposes an enhanced deferential standard for evaluating State court rulings on habeas review and "demands that state court decisions be given the benefit of the doubt."[15] Moreover, a fundamental concept for this collateral review is that habeas relief may not be granted under AEDPA by a federal habeas court conducting its "own independent inquiry whether the state court was correct as a de novo matter."[16]

Here, the Sixth Circuit and district court concluded that the Michigan Court of Appeals unreasonably applied *Jackson v. Virginia*. In *Jackson*, this Court held that critical inquiry on sufficiency claims must determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. The inquiry is not whether the

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[12] *Williams*, 529 U.S. at 407-408.

[13] *Williams*, 529 U.S. at 411.

[14] *Williams*, 529 U.S. at 409; *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

[15] *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

[16] *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004).

reviewing court itself believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, "the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[17] Thus, under *Jackson*, a habeas petitioner is entitled to relief on a sufficiency claim "if it is found that upon the record evidence adduced at the trial that no rational trier of fact could have found proof of guilt beyond a reasonable doubt."[18]

This Court emphasized that *all of the evidence* is to be considered in the light most favorable to the prosecution.[19] This standard was to be applied regardless of whether the evidence of guilt was direct or circumstantial. Indeed, this Court has stated that circumstantial evidence is entitled to equal weight as direct evidence, and the prosecution may meet its burden entirely through circumstantial evidence.[20]

Thus, under *Jackson*, the prosecutor does not have an affirmative duty to rule out every hypothesis except that of guilt.[21] And it is the province of the fact-finder—in Newman's case the jury—to weigh the probative value of the evidence and resolve any conflicts in testimony.[22] The result is that when "a federal habeas court faced with a record of historical facts that supports conflicting

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[17] *Jackson*, 443 U.S. at 318-319 (emphasis in original).

[18] *Jackson*, 443 U.S. at 324.

[19] *Jackson*, 443 U.S. at 319 (emphasis in original).

[20] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003); *Holland v. United States*, 348 U.S. 121, 140 (1954).

[21] *Jackson*, 443 U.S. at 326.

[22] *Jackson*, 443 U.S. at 318-319.

inferences must presume—even if it does not appear affirmatively in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."[23] Federal habeas courts reviewing sufficiency of the evidence claims were cautioned not to reweigh the evidence or redetermine the credibility of witnesses whose demeanor had been observed by the finder of fact.[24]

In sum, the scope of review on habeas review of the sufficiency of evidence is decidedly limited and that was true, even before the enactment of the AEDPA in 1996. Thus, 28 U.S.C. § 2254(d) has created additional limits on a federal habeas court's review. In reviewing a sufficiency of the evidence claim, deference is now required at two levels: first, deference should be given to the jury's verdict as contemplated by *Jackson*, and second, deference should be given to the State court's consideration of the jury's verdict as dictated by AEDPA.

With respect to determining whether a State court's application of clearly established law was unreasonable, this Court has stated that "the range of reasonable judgment can depend in part on the nature of the relevant rule."[25] Specifically, "applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."[26] In *Knowles*, this Court held

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[23] *Jackson*, 443 U.S. at 326.

[24] *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983).

[25] *Yarborough*, 541 U.S. at 664.

[26] *Yarborough*, 541 U.S. at 664.

that ineffective-assistance-of-counsel claims must be given extra latitude in light of the general nature of the rule:

> [B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. See *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations").[27]

The standard for sufficiency of the evidence claims constitutes another general rule which, under *Yarborough,* requires the federal courts to allow the State courts more leeway in its application.

In this case, the Michigan Court of Appeals plainly employed the correct rule in considering Newman's sufficiency claim. Next, the State court, viewing the evidence in the light most favorable to the prosecution, reasonably determined that a rational fact-finder could have found proof of the elements of the offense beyond a reasonable doubt. The State court recited the evidence that allowed the jury to convict Newman:

> [T]here was evidence that one of the murder weapons belonged to defendant. While defendant asserts that this evidence

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[27] *Knowles*, 556 U.S. at __.

is of little relevance because the gun was purchased five months before the murder, defendant was the last known purchaser of the gun, and a witness testified she saw a similar-looking gun at defendant's residence a week or two before the murder. Further, the gun was found in an abandoned gym bag that also contained a blue jean jacket, a sawed-off shotgun with tape on it, a ski mask, gloves, and a set of walkie-talkies. Hair found on the ski mask matched defendant's hair when microscopically compared, and hair similar to the hair of one of defendant's dogs was also found on the ski mask. Tape similar to the tape on the shotgun was found at defendant's residence, a substance found on the blue jean jacket appeared to contain the same elements as drywall compound used by defendant, who was a drywaller, and twine found on the gym bag was similar to twine found at defendant's residence. Further, there was testimony that defendant knew the victim and had been to the victim's home, that the victim had made a pass at defendant's girlfriend in defendant's presence, and that defendant was jealous and possessive. There was also evidence that defendant had repeatedly asked a friend for the names of any drug dealers he could rob for drugs or money. Lastly, it appeared that defendant's girlfriend may have been asking others to buttress defendant's alibi defense. [Pet. App. 49a-50a.]

The State court properly recognized that circumstantial evidence and reasonable inferences which arise therefrom can constitute satisfactory proof, and that it is unnecessary for the prosecutor to negate every reasonable theory consistent with a defendant's innocence. The State court concluded that, "when viewed in a light most favorable to the prosecution, the evidence could support an inference beyond a reasonable doubt that [Newman] either committed the murder himself or aided and abetted in its commission." Pet. App. 50a.

The State court's decision evidences an application of the *Jackson* standard that was not objectively unreasonable. The State court viewed the evidence in the light most favorable to the prosecution, then made the reasoned decision that the evidence was sufficiently persuasive to meet the constitutional threshold. As such, 28 U.S.C. § 2254(d) bars Newman from habeas relief, whether or not the State court decision was believed to be correct by the federal courts. It was not unreasonable.

The errors in this case began with the district court's decision. While the district court set forth the appropriate standard of review, it failed to follow it. In reviewing the sufficiency issue, the district court questioned or weighed the importance of certain evidence while it disregarded other evidence. The district court also erroneously quoted the State court decision and accused the State court of ignoring certain evidence, which the district court incorrectly summarized. Instead of conducting its review of the sufficiency claim under the two levels of deference mandated by AEDPA and *Jackson*, the district court considered the sufficiency issue de novo without any deference whatsoever.

Two members of the Sixth Circuit panel perpetuated the errors of the district court when they, too, failed to accord the State court's decision the required two levels of deference and instead second-guessed the jury's decision.

The Sixth Circuit actually acknowledged that there was a "wealth of information showing that Newman owned the gun"; that "ample evidence" was offered to support an inference that Newman had possessed at least one of the murder weapons; and that analysis of the items in the gym bag "strongly suggested that they belonged to Newman and had been used in Chappelear's murder." The Sixth Circuit then speculated, by giving reasons why a juror could have found the prosecution's evidence unpersuasive, mainly, that there was no evidence that Newman used or possessed the murder weapon on the actual day of the murder; no testimony or evidence actually placing him at the scene of the crime; no eyewitness testimony; and no latent fingerprints recovered. In essence, the Sixth Circuit substituted its own fact finding for that of the jury.

The Sixth Circuit then opined that the evidence supported a "host of permissible inferences." But the dissenting judge duly noted that this was "the answer to the wrong question, as *Jackson* asks only whether the jury reasonably could have convicted, not whether the evidence could have supported no other possibility." Pet. App. 15a.[28] And, as this Court has noted, it is the province of the jury alone to choose between conflicting inferences.[29] The action here by the Sixth Circuit also is

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[28] *Newman*, 543 F.3d at 799.

[29] *Jackson*, 443 U.S. at 326.

not an isolated failure to accord a State court decision the proper deference under AEDPA. Indeed the Sixth Circuit has exhibited a clearly identifiable pattern in its failure to follow AEDPA. In this regard the State would note that it is contemporaneously seeking certiorari in three other murder cases, all published, in which it contends that the Sixth Circuit, in granting habeas relief, failed to properly apply the AEDPA standard.[30]

The dissent by Judge Sutton correctly determined that the inference drawn by the jury in this case was, in fact, the most reasonable one, and after inquiring into some "other possibili[ties]," justifiably concluded that he could not identify a coherent theory of acquittal:

> Did someone borrow or steal Newman's handgun, then place a similar handgun in his laundry hamper, then place a hacksaw and wood and metal shavings matching the other murder weapon in his house, then place matching human hair, dog's hair, and drywall compound in the murderer's gym bag and then convince Newman's girlfriend to tell others to support an alibi defense that was not true and easy to contradict? Or perhaps, less nefariously, no one did any

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[30] See *Avery v. Prelesnik*, 548 F.3d 434 (6th Cir. 2008)(the Sixth Circuit rejected the State court's determination that there was no prejudice on the claim of ineffective assistance of counsel because alibi testimony is always a jury question); *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008)(the Sixth Circuit determined that there was a violation of *Miranda* where the police continued to interview the defendant where the defendant acknowledged his rights but did not expressly waive them); and *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008)(the Sixth Circuit adopted a new rule – the comparative disparity test – for evaluating whether there was a fair cross section of the community under the Sixth Amendment).

> of this, and it was all a remarkable string of coincidences. Whichever way you slice it, I see nothing unreasonable in the state court's conclusion that a rational juror could have found Newman guilty beyond a reasonable doubt. [Pet. App. 16a-17a][31]

The dissent then astutely notes that while the majority of the Sixth Circuit panel offered several reasons why a juror might have found the prosecution's evidence unpersuasive, "it offered nothing to show why *no* rational juror could have found guilt and nothing to show why that conclusion is not just wrong but unreasonable." Pet. App. 18a.[32] In other words, the Sixth Circuit panel majority both ignored and failed to apply the enhanced deferential standard that Congress ordained in AEDPA.

While parroting that circumstantial evidence alone can support a conviction, the Sixth Circuit panel majority's disagreement with the jury is based on the fact that there were no eyewitnesses to the crime or latent fingerprints recovered. Yet this reasoning is plainly at odds with accepted legal precedent, which holds that circumstantial evidence is entitled to be given equal weight as direct evidence and that the prosecution may meet its burden entirely through circumstantial evidence. Indeed, numerous convictions are based on evidence that did not include eyewitness testimony or fingerprints. Here, the lack of fingerprint evidence could be readily explained by trial testimony, which revealed that the murderer's gym bag contained cotton gloves and that the surface of firearms was not conducive to retaining fingerprints.

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[31] *Newman*, 543 F.3d at 800.

[32] *Newman*, 543 F.3d at 801.

With regard to the Sixth Circuit panel majority's statement that there was no evidence placing Newman at the scene of the crime, the dissent appropriately questions why placing Newman's gun at the scene of the crime and conclusively establishing that it was one of the murder weapons "does not do the trick—particularly in view of the other evidence linking Newman to the killer's abandoned gym bag, his acquaintance with the victim and his desire to rob a drug dealer (like the victim)." Pet. App.18a.[33]

The jury's decision in this case should not be overturned merely because it drew inferences to find Newman guilty. The twelve jurors, who actually heard the testimony and the evidence presented and considered all reasonable inferences arising therefrom, unanimously concluded Newman was guilty. Because it reasonably could have reached that conclusion, the jury's verdict should be respected.

With the combination of all of the evidence presented at trial, together with the inferences properly deducible therefrom, the jury did not act irrationally in finding Newman guilty of murder, nor did the trial judge in denying the motion for a directed verdict, nor did the three judges of the Michigan Court of Appeals in affirming the conviction, nor did the seven judges of the Michigan Supreme Court in affirming the judgment of the Michigan Court of Appeals. As aptly noted by the dissenting judge, there was abundant circumstantial evidence linking Newman to Chappelear's murder and there was simply nothing objectively unreasonable about the State court conclusions that a rational juror could have found Newman guilty beyond a reasonable doubt.

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[33] *Newman*, 543 F.3d at 801

Had the Sixth Circuit and district court properly applied the two levels of deference required upon federal habeas review and had they considered all of the evidence that had been presented in the light most favorable to the prosecution, they should have undoubtedly affirmed the State court's decision. Instead, both federal courts swept aside the requirement of according the State court's decision deference under AEDPA and this Court's precedent, and the requirement that they view all of the evidence in the light most favorable to the prosecution. The result was to set aside the jury's verdict only to substitute their own. Similar actions by federal judges were strongly condemned in 1982, when then Chief Justice Burger's dissented to this Court's denial of a petition for writ of certiorari in another sufficiency case, also involving a Michigan murder.[34] That well-reasoned dissent has even greater resonance today, particularly in light of the additional layer of deference required by AEDPA.

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[34] *Anderson v. Fuller*, 455 U.S. 1028 (1982).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted

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Dated: May 2009

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Pursuant to Sixth circuit Rule 206

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANIEL ALBERT NEWMAN,

Petitioner-Appellee,

No. 07-1782

V.

LINDA METRISH, Warden,

Respondent-Appellant.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 04-74582—Arthur J. Tamow, District Judge.

Argued: July 24, 2008

Decided and Filed: October 6, 2008

Before: MOORE and SUTTON, Circuit Judges,
ALDRICH, District Judge.*

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Thomas C. Cameron, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Bradley R. Hall, FEDERAL DEFENDER OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Raina I. Korbakis, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Bradley R. Hall, Andrew N. Wise, FEDERAL DEFENDER OFFICE, Detroit, Michigan, for Appellee. Daniel Albert Newman, Kincheloe, Michigan, pro se.

ALDRICH, J., delivered the opinion of the court, in Which MOORE, J., joined. SUTTON, J. (pp. 6-9), delivered a separate dissenting opinion.

OPINION

ANN ALDRICH, District Judge. The State of Michigan appeals a judgment granting Daniel Albert Newman's application for a writ of habeas corpus on the basis that there was insufficient evidence to support his conviction. Because there was neither direct nor circumstantial evidence placing Newman at the scene of the crime, we affirm.

I. Background

A. The crime

In February of 1992, Henryy Chappelear ("Chappelear") was fatally shot during the robbery of his home. Chappelear, a known drug dealer, regularly stored marijuana in his freezer. On the day of the murder, one of Chappelear's friends came to his house, noticed a porch lightbulb removed and smashed on the

ground, and entered the house. Inside, the friend saw the open freezer door, discovered Chappelear's dead body, and called the police. (J.A. 707.) Evidence recovered from the scene established that Chappelear was shot by a 12-gauge shotgun and a 9-millimeter handgun.

The day after the homicide, two men found a gym bag by the side of the road that contained a jean jacket, a 9-millimeter handgun, a sawed-off shotgun with tape wrapped around the grip, a ski-mask-type hat, two walkie-talkies, and some gloves. (J.A. 131-37.) The bag and its contents were turned over to the police. Subsequent analysis of the items strongly suggested that they belonged to Newman and had been used in Chappelear's murder.

B. Trial

Newman was subsequently tried and convicted by a jury for first-degree premeditated murder and felony firearm.

At trial, the prosecution sought to prove that Newman had planned to rob and kill Chappelear by introducing evidence that Newman had intended to rob drug dealers for drugs or money, that Chappelear was a known drug dealer who stored drugs in his freezer, that Newman may have ordered drugs from Chappelear in the past, and that Chappelear's freezer was open and empty after the homicide. In addition, the prosecution a empted to establish a motive by offering testimony that Newman had previously seen Chappelear make a pass at his girlfriend.

The prosecution also introduced evidence supporting an inference that Newman had possessed the murder weapons. First, hairs found on the ski-mask were found to match all visual characteristics of

Newman's hair and the hair of one of his dogs. Second, evidence was introduced that a hacksaw had been seized from Newman's home, and there were markings on the shotgun barrel and stock that were not inconsistent with markings that could have been created by a hacksaw. Third, twine found in the gym bag was similar to twine seized from Newman's house. Fourth, debris found inside the gym bag and on the jean jacket chemically and visually matched a container of drywall seized from the car of Newman's girlfriend. Fifth, a firearms expert testified that the spent cartridges and bullet recovered from Chappelear's body matched the 9-millimeter handgun found in the gym bag. Last, testimony established that the gun used in the homicide had been purchased by Newman in 1991, and that a friend of his had seen a similar gun in Newman's home a couple of weeks prior to the homicide. However, the friend could not say for sure that the murder weapon was the same one that she had seen because it was dark and the gun was in a laundry bin.[1]

Although the prosecution offered ample evidence to support an inference that Newman had previously possessed at least one of the murder weapons, the prosecution did not offer any evidence that Newman had used or possessed the weapons on the day of the murder. There was no eyewitness testimony, nor were the police able to recover any latent fingerprints from the crime scene or the items in the gym bag.

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[1] Although the strength of some of this evidence was called into question by other testimony, at this stage of review, we view all of the evidence in the light most favorable to the prosecution. Accordingly, such testimony is not discussed here.

Newman did not testify. Instead, he called several witnesses to establish an alibi.

Newman's conviction for first-degree murder was subsequently vacated, and an order of second-degree murder was entered in its stead.

C. Direct appeal and post-conviction relief in state court

Newman appealed his convictions to the Michigan Court of Appeals, arguing that there was insufficient evidence to sustain his conviction. In an opinion dated July 2, 1999, the Michigan Court of Appeals denied his appeal because "[v]iewing the evidence in a light most favorable to the prosecution... a rational trier of fact could have found beyond a reasonable doubt" all of the elements of the crimes. (J.A. 679.)

The Michigan Court of Appeals found that the lack of eyewitnesses was not dispositive, stating that the circumstantial evidence presented was sufficient to "support an inference beyond a reasonable doubt that [Newman] either committed the murder himself or aided and abetted in its commission." (J.A. 679) Accordingly, the court affirmed Newman's convictions and denied his motion for a rehearing.[2]

Newman was subsequently denied post-conviction relief in the state trial and appellate courts.

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[2] Newman raised other arguments before the Michigan Court of Appeals which are not at issue here.

D. Application for a writ of habeas corpus

Having exhausted the remedies available to him in state court, Newman filed an application for a writ of habeas corpus alleging that there was insufficient evidence to establish that he participated in the murder, either directly or as an aider and abettor.[3] Upon review, the district court foun4 that the Michigan Court of Appeals had failed to consider three important pieces of evidence, that the prosecution had failed to establish a solid chain of inferences at trial, and that there was no evidence placing Newman at the scene of the crime. *Newman v. Metrish*, 492 F. Supp. 2d 721,730-31 (E.D. Mich. 2007). Accordingly, the district court determined that the Michigan Court of Appeals had not reasonably applied the standard articulated in *Jackson v. Virginia,* noting that although the facts relied on by the court of appeals "may have supported a 'reasonable speculation' that [Newman] participated in the murder," they did "not amount to proof beyond a reasonable doubt." *Id.* at 729, 732. Thus, the district court unconditionally granted Newman's application for a writ of habeas corpus.

II. Standard of Review

In reviewing a district court order granting an application for a writ of habeas corpus relief, we review legal conclusions tie novo. *Towns v. Smith*, 395 F.3d 251, 257 (6th Cir. 2005). Although we generally review the district court's findings of fact for clear error, we review de novo "when the district court's decision in a habeas case is based on a transcript from the petitioner's state court trial, and the district court

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[3] Newman's application raised other grounds for relief that are not at issue here.

thus makes no credibility determination or other apparent finding of fact." *King v. Bobby*, 433 F.3d 483, 489 (6th Cir. 2006) (quotation omitted).

Newman's application is governed by the Antiterrorism and Effective Death Penalty Act, codified at 28 U.S.C. § 2254(d), which provides that his application for a writ of habeas corpus:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim. . . resulted in a decision that was contrary to, or involved an *unreasonable application* of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d) (emphasis added).

At issue here is whether the decision of the Michigan Court of Appeals involved such an "unreasonable application" of federal law. A district court may not issue a writ upon concluding only that the state court applied the law erroneously or incorrectly. *Williams v. Taylor*, 529 U.S. 362, 410 (2000). "Rather, that application must also be unreasonable," meaning that the state court "unreasonably applie[d] that principle to the facts of the prisoner's case." *Id.* at 411, 413.

III. Discussion

At issue here is whether the Michigan Court of Appeals unreasonably applied clearly established federal law as set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, habeas relief is warranted "if it is found that upon the record evidence

adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324. In considering whether there was sufficient evidence for any rational trier of fact to find proof beyond a reasonable doubt as to every element of the crime, we consider all of the evidence in the light most favorable to the prosecution. *Id.* at 319.

The *Jackson* standard is as easy to articulate as it is difficult to apply. Where there is only circumstantial evidence available, as in the instant case, this ineffable standard is especially challenging, and even more so when that evidence supports a host of permissible inferences.

As a starting point, we note that " evidence alone is sufficient to support a conviction, and it is not necessary for the evidence to exclude every reasonable hypothesis except that of guilt." *Johnson v. Coyle,* 200 F.3d 987, 992 (6th Cir. 2000) (quotation omitted). In *Johnson*, we found Johnson's conviction to be fully supported by circumstantial evidence where (1) he had been angry with the victim and was the last known person to see her alive, (2) her body was found near an off-road trail that Johnson had discovered recently, and was near a piece of carpet from Johnson's car, (3) Johnson exhibited a series of erratic and suspicious behaviors after the victim disappeared, and (4) Johnson confessed to the murder several times. *Id.* at 991-92.

Although circumstantial evidence alone can support a conviction, there are times that it amounts to only a reasonable speculation and not to sufficient evidence. *See, e.g., Parker v. Renico*, 506 F.3d 444, 452 (6th Cir. 2007) (evidence that Parker was in a car containing guns with men who planned a murder was too speculative to support a finding that Parker constructively possessed the firearm); *Brown v.*

Palmer, 441 F.3d 347, 352 (6th Cir. 2006) (finding evidence that Brown was present at the scene and had some acquaintance with the perpetrator insufficient to support a conviction of armed robbery and car-jacking under an aiding and abetting theory); *Fuller v. Anderson,* 662 F.2d 420, 423-24 (6th Cir. 1981) (verdict for felony murder not supported by evidence showing only that Fuller was present at the scene of the arson where evidence did not establish beyond a reasonable doubt that Fuller consciously acted to aid in the arson); *Hopson v. Foltz,* No. 86-1155, 1987 U.S. App. LEXIS 6596, at *5 (6th Cir. May 20, 1987) (evidence insufficient to support conviction of second-degree murder on theory of aiding and abetting where there was no proof "that Hopson acted in pre-concert with [the shooter] to commit the murder or that he said or did anything to support, encourage, or incite the commission of the crime.").

Here, if we consider all of the evidence in the light most favorable to the prosecution, there remains reasonable doubt because we are limited by what inferences reason will allow us to draw. We can infer only that Newman intended to rob a drug dealer and knew that Chappelear was a drug dealer, that a gun previously owned by Newman was used to kill Chappelear, and that a similar looking gun was seen in Newman's home approximately two weeks before the murder. However, the witness who saw the gun said she could not say for sure that it was the same one used in the homicide because the gun was in a laundry bin and it was dark. Further, even assuming that Newman's gun was indeed the one used in the homicide, there was no evidence of what happened to it between that date and the date of the homicide, and we need not speculate as to what might have

happened.[4] Although the evidence need not exclude every reasonable hypothesis except that of guilt, it must be enough for any rational trier of fact to have found proof of guilt beyond a reasonable doubt.

Although there is a wealth of information showing that Newman owned the gun, conspicuously absent is any evidence placing Newman at the scene of the crime. There was neither eyewitness testimony, nor were any fingerprints recovered. Without additional evidence placing him at the scene of the crime, there is only a reasonable speculation that Newman himself was present.

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[4] For example if the witness had observed the gun in Newman's house only a day before the homicide and had been more certain that it was indeed the same gun as that used in the homicide, there would be a stronger inference that Newman was present. With these hypothetical facts, Newman's petition would more closely resemble those made in cases where circumstantial evidence did satisfy the *Jackson* standard. *See, e.g., Matthews v. Abrarnajtys,* 319 F.3d 780, 788-89 (6th Cir. 2003) (rejecting a sufficiency challenge brought by a defendant whose murder conviction was based on circumstantial evidence, including eyewitness testimony placing him near the scene of the crime on the morning of the murder); *Apanovitch v. Houk,* 466 F.3d 460, 488-89 (6th Cir. 2006) (rejecting a sufficiency challenge by a defendant whose murder conviction was based on circumstantial evidence, including evidence that the defendant spoke with the victim about painting her window sills, one of which was used to stab her in the neck approximately eight hours later).

IV. Conclusion

There is no bright line test to determine when facts amount to only a reasonable speculation and not to sufficient evidence. However, where the evidence taken in the light most favorable to the prosecution creates only a reasonable speculation that a defendant was present at the crime, there is insufficient evidence to satisfy the Jackson standard. Accordingly, we conclude that the Michigan Court of Appeals unreasonably applied clearly established federal law and the decision of the district court granting a writ of habeas corpus is affirmed.

DISSENT

SUTTON, Circuit Judge, dissenting. There is another way to look at this case. The question at hand is whether, as AEDPA demands, the state courts' affirmance of this conviction amounted to "an unreasonable application" of "clearly established" United States Supreme Court precedent. 28 U.S.C. § 2254(d)(1). The clearly established federal rule asks not whether we "believe that the evidence at the trial established guilt," but "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318—19 (1979) (internal quotation marks omitted). And in asking whether the state courts reasonably concluded that "any rational trier of fact" fairly could have convicted this defendant, we may rely on circumstantial evidence of guilt. *See United States v. Arnold,* 486 F.3d 177, 181-82 (6th Cir. 2007) (en banc). Ample evidence showed that Newman was the killer.

Newman Owned One of the Murder Weapons. Start with the uncontradicted fact that Newman owned one of the two guns used to kill Chappelear. Five months before the murder, he purchased a Ruger 9-millimeter handgun, which conclusively matched at least one of the cartridges found at the crime scene and one of the bullets recovered from Chappelear's body. No evidence introduced at trial showed, or even hinted, that Chappelear did not still own and possess the gun on the day of the murder. And the jury heard evidence that, when viewed in the light most favorable to the prosecution, showed that he still possessed the handgun when Chappelear was murdered. One of

Newman's girlfriends, Patricia Mueth, saw a "similar" handgun in his laundry hamper just a week or two before the killing. JA 562-63.

Evidence Connected the Murderer's Gym Bag to Newman. The day after the murder, two hunters found an abandoned gym bag that contained all of the tools of the murder. The gym bag not only contained Newman's 9-millimeter handgun, but it also contained other items used by the murderer and linked to Newman: (1) a ski mask with hairs similar to Newman's and the hair on one of his two dogs, (2) a jean jacket besmirched with debris that visually and chemically matched a drywall compound recovered from the car Newman was using on the day police arrested him (Newman was a drywaller) and (3) twine matching twine found in Newman's home.

Evidence Connected Newman to the Second Murder Weapon. Inside the gym bag was another link between Newman and the murder. The murderer, the evidence showed, shot Chappelear not just with Newman's handgun but also with a 12-gauge shotgun, and the recovered bag contained a 12-gauge-sawed-off shotgun. The murderer had cut the shotgun's wooden stock and iron barrel and had wrapped the handle with duct tape. When the police investigated Newman's home, they discovered duct tape, a hacksaw with wood in the blade's teeth and a pile of wood and iron shavings on a workbench in his garage.

Newman Knew the Victim. Newman knew Chappelear and had visited his home at least once in the months before the murder.

Newnan Had a Motive. Newman's own words offer a plausible motive for the killing or at the least an explanation for his armed presence in Chappelear's home. According to Mueth, Newman told her that he

wanted to rob some drug dealers, told her that "he wanted guns, drugs, money, anything that he could use" and implored her "daily" for the names and addresses of potential targets. JA 568. Newman knew one such target, as it turns out. Having apparently bought drugs from Chappelear before, Newman knew that he was a drug dealer, and apparently so did Chappelear's killer, as the hiding place where Chappelear stored drugs (his freezer) had been left open for some time when his body was found.

Newman's Alibi Suggested Guilt. In claiming that Newman spent the night of the murder at the bar where his new girlfriend (Nancy Leat) worked, Newman's defense team added fuel to the fire. Several witnesses present at the bar that evening testified that, even though they did not recall whether Newman was present that night, Leat asked them repeatedly to tell police that Newman was there. *Cf Apanovitch v. Houk*, 466 F.3d 460, 488-89 (6th Cir. 2006) (rejecting sufficiency challenge and reciting the evidence relied on by the state court that included the petitioner's "variety of inconsistent stories about his whereabouts on the night of the murder"); *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000) (same).

In the face of this evidence, I am not sure what to say. Newman owned one of the murder weapons; the other murder weapon—a sawed-off 12-gauge shotgun—was connected to him based on the metal and wood shavings found in his house; both weapons were found in a gym bag that also contained hair, twine and drywall compound that matched items from him, his dog, his house and his car; he knew the victim; he had a motive for robbing the victim and for doing so in well-aimed fashion (the victim was a drug dealer); and his blundering alibi was far more suggestive of guilt than innocence. The majority may be right that the evidence at trial "support[ed] a host

of permissible inferences," Maj. Op. at 4—some indicative of guilt, some perhaps not. But this is the answer to the wrong question, as *Jackson* asks only whether the jury reasonably could have convicted, not whether the evidence supported no other possibility.

At any rate, I am hard-pressed to say what that other possibility is and why this fact pattern *compelled* a jury—or reviewing state court—to acquit, or in the future would compel a state or federal trial judge not even to submit the charge to a jury. What after all are the "permissible inferences" of innocence or, if you will, non-guilt? Is it problematic that Patricia Mueth testified only that Newman had a "similar" handgun in his laundry hamper a week or two before the killing? Once we view the evidence the way *Jackson* commands, Mueth's testimony means one of two things: either that, just before the murder, Newman still possessed the Ruger 9-millimeter murder weapon he bought five months before the slaying or that, just before the murder, he owned a *second handgun* that was not "significantly different" from the murder weapon, JA 563; *cf Arnold,* 486 F.3d at 182. It is the rare defense attorney who would implore a jury to acquit on the ground that his client possessed just two handguns similar to the murder weapon immediately before the murder.

Is it problematic, as the district court concluded, that the prosecution's expert testified that ballistics tests comparing the sawed-off shotgun with shells found at the scene were inconclusive? While the prosecution could not conclusively determine that the shotgun found in the gym bag (and elsewhere connected to Newman through the metal and wood shavings) fired the shells at the crime scene, no one needed that evidence to convict. Because the abandoned gym bag, found a day after the murder, already contained one of the verified murder weapons

and a ski mask, it hardly required a leap of logic to deduce that the shotgun found in the same gym bag was the second murder weapon. Unless, that is, the murderer possessed not just two handguns but two shotguns as well—and simply chose to leave the unused shotgun in the gym bag with the used 9-millimeter Ruger while taking the used shotgun with him. Needless to say, this was not defense counsel's theory of the ease.

Is it problematic, as the majority notes, Maj. Op. at 5, that the police did not find Newman's fingerprints at the crime scene? No. The murderer's gym bag not only contained two weapons and a ski mask, but it also contained cotton gloves, which would readily explain why no one found Newman's fingerprints at the crime scene.

Is it problematic that the prosecution relied on the existence of matching twine (found in the gym bag) and duet tape (found on the sawed-off shotgun)? Yes, if that had been the only evidence of guilt introduced by the prosecution. But it was not, and the relevance of this evidence was not in its isolation bin in its cumulative effect with the other far-more-damning evidence.

While it is not the prosecution's burden to disprove every reasonable hypothesis other than guilt, *see Apanovitch,* 466 F.3d at 488, I cannot identify a coherent theory of acquittal. Did someone borrow or steal Newman's handgun, then place a similar handgun in his laundry hamper, then place a hacksaw and wood and metal shavings matching the other murder weapon in his house, then place matching human hair, dog's hair and drywall compound in the murderer's gym bag and then convince Newman's girlfriend to tell others to support an alibi defense that was not true and easy to contradict? Or perhaps, less

nefariously, no one did any of this, and it was all a remarkable string of coincidences. Whichever way you slice it, I see nothing unreasonable in the state court's conclusion that a rational juror could have found Newman guilty beyond a reasonable doubt.

Our most analogous precedents place serious obstacles in front of reaching a contrary conclusion. In *Matthews*, we rejected a sufficiency challenge to a murder conviction where the evidence showed that the defendant knew one of the victims, was seen in the area before the killing and tried to pawn a unique ring belonging to another victim a week later. *See* 319 F.3d at 783-84, 788-89. We held that this evidence sufficed despite an eyewitness's testimony that the person he saw stooped over one of the victims "as if to check him out" within moments of hearing the fatal gunshots was not the defendant. *Id.* at 783 (internal quotation marks omitted). In *Apanovitch*, we held that, even without AEDPA's additional layer of deference, the prosecution met its burden of showing that the defendant committed aggravated murder in the course of attempting to rape the victim. *See* 466 F.3d at 488-89. Circumstantial evidence showed that the defendant, who had been hired by the victim to paint her house, was familiar with the victim's home, "had made statements to others of his desire to have sexual relations with her," spoke with her earlier on the day of the murder, had a scratch on his face after the murder that was "consistent with" being scratched by a fingernail, offered inconsistent stories instead of an "adequate" alibi and (along with roughly a third of the male population) had the same blood type as the perpetrator. *Id.* And although investigators found fingerprints at the scene, none of them belonged to the defendant, nor did any other physical evidence identify him as the culprit. *Id.* at 464.

The majority's explanations for its decision do not overcome these obstacles. While the majority offers several reasons why a rational juror might have found the prosecution's evidence unpersuasive, Maj. Op. at 4-5, it offers nothing to show why *no* rational juror could have found guilt and nothing to show why that conclusion is not just wrong but unreasonable. While the majority acknowledges that circumstantial evidence may suffice by itself to sustain a conviction, *Id.* at 4, the only example it offers involved a defendant who repeatedly confessed to the murder. *See Johnson v. Coyle,* 200 F.3d 987, 991 (6th Cir. 2000). While the majority says that the prosecution offered nothing "placing Newman at the scene of the crime," Maj. Op. at 3, I wonder why "placing Newman['s gun] at the scene of the crime" and establishing that it was one of the murder weapons does not do the trick—particularly in view of the other evidence linking Newman to the killer's abandoned gym bag, his acquaintance with the victim and his desire to rob a drug dealer (like the victim).

The majority's other citations simply reaffirm an age-old rule—"mere presence" at the scene of a crime does not establish guilt in a joint criminal enterprise, *see, e.g., Fuller v. Anderson,* 662 F.2d 420,424 (6th Cir. 1981)—but one with no conceivable application here. *Cf Parker v. Renico,* 506 F.3d 444, 452 (6th Cir. 2007) (holding that "evidence [that] suggested only that [the defendant] was in a car with men who together planned a murder and that guns were in the car" was insufficient to support felon-in-possession-of-a-firearm and felony-firearm convictions); *Brown v. Palmer,* 441 F.3d 347, 349, 352-53 (6th Cir. 2006) (holding that evidence that the defendant was "present at the scene of the crime," had "a brief relationship with the carjacker" and left the scene after his own car was taken by others was insufficient to support a conviction for aiding and abetting a carjacking);

Hopson v. Foltz, No. 86-1155, 1987 WL 37432, at *2 (6th Cir. May 20, 1987) (sustaining a sufficiency challenge to a conviction for aiding and abetting murder where the evidence established the defendant's presence at the scene, that he "may have argued with the victim" the day before, "may have known that someone else intended to harm" the victim and may have picked up empty shell casings after the murder).

Jackson takes for granted that reasonable minds may differ as to what conclusions a given set of facts will bear. And AEDPA implores federal judges to respect the different reasonable inferences that state-court judges may uphold in reviewing sufficiency challenges to state-court convictions. Because this double dose of deference precludes us from second guessing the jury's decision to convict on this record, I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DANIEL ALBERT NEWMAN,

Petitioner,

v.

LINDA METRISH,

Respondent,

_____/

Civil Nos. 04-CV-74582-DT
HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

OPINION AND ORDER GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS

Daniel Albert Newman, ("petitioner"), presently confined by respondent, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254 In his habeas application, filed both pro so and supplemented by counsel, petitioner challenges his convictions for second-degree murder, M.C.L.A. 750.317; and felony-firearm, MC.L.A. 750.227b and his sentence. Because of the lack of sufficient evidence to support a conviction, petitioner's petition for writ of habeas corpus is **GRANTED**.

I. Background

Petitioner was convicted of first-degree premeditated murder and felony-firearm following a jury trial in the Livingston County Circuit Court. Petitioner has maintained his innocence. The first-degree murder conviction was reduced to second-degree murder by the trial court on remand from the Michigan Court of Appeals. The court imposed a sentence of forty to eighty years.

The prosecution alleged that petitioner participated in the murder of Harry Chappelear within his residence on February 28, 1992. The prosecution theory was that Newman planned to rob and kill a known drug dealer, who was shot and killed during a robbery of his home.

Gary Boyd was a friend of the victim and had previously purchased marijuana from him. The victim stored mar in his freezer. On the date in question, Boyd went to the victim's home and noticed that the bulb from the porch light had been removed and smashed on the ground. When Boyd entered the house, he noticed that the freezer door was open and then discovered the victim's body. Boyd called the police.

Jeffrey Wise and Brent DeWolfe both testified that on the day after the homicide, they were traveling on a dirt road in Brighton Township, when they noticed and recovered a blue gym bag which contained a blue Jean Jacket, a Ruger handgun, a sawed-off shotgun, a ski mask-type hat, gloves, and two walkie-talkie radios. The men turned these items over to the police.

Donald Minton, a laboratory scientist for the Michigan State Police, testified that he was unable to recover any latent fingerprints from the evidence discovered in the gym bag.

Millard Holton, a firearms expert for the Michigan State Police, testified that he determined that the spent cartridges and bullet recovered from the victim's body matched the Ruger P85 9-millimeter handgun discovered in the gym bag by Mr. DeWolfe and Mr. Wise. Holton, however, could neither identify or eliminate the shotgun that was recovered from the bag as having been used in the murder.

The prosecutor then called a series of witnesses to establish that the Ruger P85 9-millimeter pistol in question had originally been sold in an Ohio gunshop and passed through various hands to an individual named Jeffrey Wesley who in turn sold the gun to petitioner in the Fall of 1991.

Hamburg Township Police Officer Patrick DeBottis searched petitioner's home. Dog hairs were seized from a pen outside petitioner's home. Other items seized from the Defendant's residence were a hacksaw, a piece of twine, metal shavings, and a roll of duct tape. Duct tape had been wrapped on the grip of the sawed-off shotgun discovered in the gym bag. Police also recovered several 9-millimeter cartridges from petitioner's home. A container of drywall compound was removed from petitioner's girlfriend's vehicle. A sample of petitioner's hair was seized from him.

Michigan State Police Detective Robert Babbitt testified that he was unable to recover any latent fingerprints from the crime scene or from either of the weapons recovered from the gym bag. Babbitt was also unable to recover latent fingerprints from the 9 mm. casings or the shotgun shell casings that were recovered in this case.

Officer DeBottis also testified that apparent drug records with the name "Dan" on them were discovered in the victim's home.

Roger Bolhouse a trace evidence expert with the Michigan State Police, testified as to his comparisons of evidence in this case. Bolhouse testified that the twine seized from petitioner's house was similar to the twine sample from the gym bag. However, Bolhouse testified that he was unable to state positively that the twine recovered from petitioner's house was joined

together with the twine found in the gym bag or even came from the same roll of twine. Bolhouse indicated that there was no marker thread that would lend a unique appearance to the twine. (T. V., pp. 85-87).[1] Debris inside the gym bag and on a blue Jean jacket found inside of the bag chemically and visually matched the drywall compound seized from petitioner's girlfriend's vehicle. Bolhouse examined markings found on the shotgun barrel and stock which had been found inside the of the gym bag and determined that they were not inconsistent with markings that could be created by a hacksaw. However, Bolhouse indicated that he could not state that the hacksaw recovered from petitioner's house, or any hacksaw for that matter, created the markings on the shotgun. Bolhouse emphasized that it would not be possible with his current equipment or expertise to conclude that a hacksaw was used to cut the shotgun's stock or barrel. (Id., pp. 106-110) Bolhouse further determined that petitioner's size eleven footwear did not match the size 6-9 footprints discovered by the police at the murder scene or where the gym bag was recovered.

Michigan State Police Serology Technician Marie Bard-Curtis determined that no blood was found on petitioner's boots or tennis shoes. Carpet and fabric from petitioner's car did not contain blood. Bard-Curtis also determined that no blood was on the items found inside of the gym bag.

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[1] The Court will only cite to those portions of the trial transcript which involve testimony that was either in dispute or which was ignored or misconstrued by the Michigan Court of Appeals when it affirmed petitioner's conviction.

Michigan State Police Laboratory Scientist Glen Moore testified that a dog hair recovered from petitioner's home and the hair sample removed from the petitioner were similar to the hairs discovered on the ski mask found in the gym bag. Moore, however, could not state with certainty that the hairs found on the ski mask were the same hair as petitioner's hair or the dog hair recovered from petitioner's house. The best that Moore could determine was that the hairs could have come from the same source. Moore, in fact, could not identify the species of dog that the dog hair came from. (TV, pp. 212-13, 216-17, 221, 226).

Officer Eric Calhoun was recalled to the stand and testified that the telephone number of the petitioner's mother had been discovered in the victim's personal address book.

Nancy Leat testified that she was petitioner's girlfriend who lived with him at his mother's home. Ms. Leat testified that petitioner was a drywaller by trade, that he knew the victim, and that he had been to the victim's home. Ms. Leat also recalled that the victim had made "a pass" at her in petitioner's presence. However, Leat also testified that petitioner did not react in any way, testifying further that he was not jealous or possessive. (T. VI, pp. 28-31).

Patricia Mueth testified that she was as a friend of both petitioner and Nancy Leat. Ms. Mueth recalled on one occasion observing a gun in petitioner's home which was similar in appearance to the 9- millimeter used in the homicide. Mueth also recalled that petitioner had asked her about the names of any drug dealers that he could rob for drugs or money. Mueth later clarified that petitioner was interested in taking the dealers' money when they were away from home. (T. VI, p. 99).

At the conclusion of the prosecution's case, the trial court granted petitioner's motion for directed verdict on the first-degree murder charge, finding that there was insufficient evidence of premeditation and deliberation. Immediately after granting the motion for directed verdict, the trial court held its decision in abeyance upon the prosecution's request.

Petitioner presented an alibi defense in his behalf.

Petitioner was convicted of first-degree premeditated murder and felony-firearm. The trial court subsequently granted petitioner's motion to issue a certificate that it would vacate petitioner's first-degree murder conviction and enter an order of second-degree murder and conduct a re-sentencing. *People v. Newman,* No. 92-7032 -FC (Livingston County Circuit Court, April 10, 1997). The Michigan Court of Appeals subsequently remanded the matter to the trial court to enter a judgment on, and re sentence petitioner for, second-degree murder. *People v. Newman,* No. 165208 (Mich.Ct.App. June 12, 1997). On remand, a judgment was entered for second-degree murder and petitioner was re-sentenced to forty to eighty years on that count.

Petitioner's conviction was affirmed on appeal after remand. *People v. Newman,* No. 165208 (Mich.Ct.App. July 2, 1999); *lv. den.* 461 Mich. 999; 611 NW. 2d 795 (2000); *reconsideration den.*, 461 Mich. 999; 626 N.W. 2d 412 (2000).

Petitioner then filed a post-conviction motion for relief from judgment, which was denied by the trial court. *People v. Newman,* No. 92-7032 -FC (Livingston County Circuit Court, August 6, 2002); *reconsideration den.* The Michigan appellate courts denied petitioner leave to appeal. *People v. Newman,* No. 249994 (Mich.Ct.App September 4, 2003); *reconsideration den.*

No. 249994 (Mich.Ct.App. October 29, 2003); *lv. den.*, 470 Mich. 860; 679 N.W. 2d 74 (2004); *reconsideration den.*, 471 Mich. 874; 685 NW. 2d 671 (2004); *cert. den. sub nom Newman v. Michigan*, 543 U.S. 1125 (2005).

Petitioner now seeks habeas relief on the following grounds:

> I. The evidence was legally insufficient as to the two elements at issue during trial: whether [Petitioner] was present to cause the death of Harry Chappelear; whether Petitioner shared an acting in concert preconceived intent to kill.
>
> II In opening statement the prosecutor never asserted that he could prove [Petitioner] was present or shared the principal's preconceived intent to kill during the murder, defense counsel was ineffective in violation of the Sixth Amendment by not moving for directed verdict at the conclusion of the opening statement; it would have been granted.
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> III. After detailed factual analysis, the court directed a verdict of acquittal on first degree murder; at the prosecutor's request the court reconsidered the facts to hold the decision in abeyance. Considering anew the facts even for this purpose constitutes double jeopardy requiring reversal under the due process clause as ultimately the jury considered a highly prejudicial acquitted offense.
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> IV. The due process clause of the United States Constitution was violated by egregious prosecutorial misconduct which

included (1) bringing a charge without probable cause; (2) misleading the court that an acquittal could be reversed; (3) misleading the court and jury twice by claiming that alibi witnesses recalled Newman in a bar nine days after his arrest. Cumulative prosecutorial misconduct warrants dismissal of the charges or tailoring the relief to cure the constitutional injury suffered by Petitioner.

V. The Court limited sentencing considerations to the guideline variables, presentence report inaccuracies, and allocution as they were raised verbally in court. Thus, [Petitioner] was deprived of a right to present a defense, the effective assistance of counsel, and an appeal of right on the merits in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

VI. The [state courts] deprived [Petitioner] of due process of law under the United States Constitution when it declined to remand the case to the trial court for an evidentiary hearing on ineffective assistance of appellate counsel before granting or denying relief.

VII. The [state courts] deprived [Petitiner] of due process of law under the United States Constitution when it declined to remand the case to the trial court so Judge Latreille could rule on the issues raised by [Petitioner] under the appropriate standards for relief contained in MCR 6.508(D).

VIII. The [state courts] deprived [Petitioner] of due process of law under the United States Constitution when it declined to remand the case to the trial court as [timely filed the motion for reconsideration in the trial court; the trial court must rule on the issues to accord Petitioner due process of law

II. Standard of Review

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *Harpster v. State of Ohio*, 128 F.3d 322, 326 (6th Cir. 1997).

Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1).

A decision of a state court is "contrary to" clearly established federal law if the state court

arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor,* 529 U.S. 362, 405- 06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11.

III. Discussion

A. Claim #1. The sufficiency of evidence claim.

Petitioner first claims that there was insufficient evidence to establish that he participated in the victim's murder, either directly, or as an aider and abettor.

The Michigan Court of Appeals held that there was sufficient evidence to support an inference that petitioner either committed the murder himself or aided and abetted in its commission, based on the fact that there was evidence that one of the murder weapons belonged to petitioner and that a witness testified she saw a similar-looking gun at petitioner's home a week or two before the murder. The Michigan Court of Appeals further observed that the gun was found in an abandoned gym bag that also contained a blue jean jacket, a sawed-off shotgun with tape on it, a ski mask, gloves, and a set of walkie-talkies. The Michigan Court of Appeals found that the hair recovered from the ski mask matched petitioner's hair, and hair similar to the hair of one of petitioner's dogs was also found on the ski mask. The Michigan Court

of Appeals further observed that tape similar to the tape on the shotgun was found at petitioner's home, a substance found on the blue jean jacket appeared to contain the same elements as drywall compound used by petitioner, and twine found on the gym bag was similar to twine found at petitioner's residence. The Michigan Court of Appeals also noted that petitioner knew the victim and had been to the victim's home, that the victim had made a "pass" at petitioner's girlfriend in his presence, and that petitioner was jealous and possessive. The Michigan Court of Appeals also relied on evidence that petitioner had "repeatedly" asked a friend for the names of any drug dealers he could rob for drugs or money. Finally, the Michigan Court of Appeals noted that "it appeared that defendant's girlfriend may have been asking others to buttress defendant's alibi defense." *Newman*, Slip. Op. at * 2.

A habeas court reviews claims that the evidence at trial was insufficient for a conviction by asking whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Because a claim of insufficiency of the evidence presents a mixed question of law and fact, this Court must determine whether the state court's application of the *Jackson* standard was reasonable. *Johnson v. Hofbauer*, 159 F. Supp. 2d 582, 596 (E.D. Mich. 2001). Moreover, the *Jackson* standard must be applied "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324, n. 16.

Under Michigan law, the elements of second degree murder are (1) a death; (2) caused by an act of the defendant; (3) with malice, and (4) without justification or excuse. *Hill v. Hofbauer*, 195 F. Supp.

2d 871, 885 (E.D. Mich 2001)(citing *People v. Goecke*, 457 Mich. 442, 463-64; 579 N. W. 2d 868 (1998)).

Under Michigan law, the elements of felony-firearm are that the defendant possessed a firearm during the commission of, or an attempt to commit, a felony offense. See *Payne v. Smith*, 207 F. Supp. 2d 627, 642 (ED. Mich. 2002)(citing *People v. Avant,* 235 Mich. App. 499, 505; 597 N.W. 2d 864 (1999)).

Under Michigan law, to support a finding that a defendant aided and abetted in the commission of a crime, the prosecutor must show that:

> 1. the crime charged was committed by the defendant or some other person;
> 2. the defendant performed acts or gave encouragement that assisted the commission of the crime; and
> 3. the defendant intended the commission the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.

Brown v. Palmer, 441 F. 3d 347, 351 (6th Cir. 2006)(citing *People v. Cannes*, 460 Mich. 750, 757-58; 597 N.W. 2d 130 (1999).

In order to be guilty of aiding and abetting under Michigan law, the accused must take some conscious action designed to make the criminal venture succeed. *Fuller v. Anderson,* 662 F. 2d 420, 424 (6th Cir. 1981); *cert. den.* 455 U.S. 1028 (1982). Aiding and abetting describes all forms of assistance rendered to the perpetrator of the crime and comprehends all words or deeds which might support, encourage, or incite the commission of the crime. *People v. Turner*, 213 Mich. App. 558, 568; 540 N.W. 2d 728 (1995).

In the present case, petitioner is entitled to habeas relief, because there was insufficient evidence presented for a rational trier of fact to conclude beyond a reasonable doubt that petitioner actually killed or participated in the killing of the victim. *See Speignerv. Jago,* 603 F. 2d 1208, 1213-15 (6th Cir. 1979). The facts relied upon by the Michigan Court of Appeals in affirming petitioner's conviction may have supported a "reasonable speculation" that petitioner participated in the murder, but these facts do not amount to proof beyond a reasonable doubt. Mere suspicion cannot sustain a verdict of guilt beyond a reasonable doubt. *See United States v. Jenkins,* 345 F. 3d 928, 942 (6th Cir. 2003); *see also United States v. Hayter Oil Co., Inc. of Greeneville, Tennessee,* 51 F. 3d 1265, 1271, n. 5 (6th Cir. 1995)(quoting *United States v. Van Hee,* 531 F. 2d 352, 357 (6th Cir. 1976))(holding that ' that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal.").

In *Fuller v. Anderson, supra,* the Sixth Circuit held that in a prosecution for felony-murder, the evidence established, at most, that the petitioner was present when another individual firebombed the house. That was held to be insufficient to establish beyond a reasonable doubt that petitioner took conscious action to aid in the commission of the underlying arson. *Id.* at 424. The evidence in *Fuller* was the petitioner had looked around while another person started the fires that caused the victim's death. The Sixth Circuit agreed with the district court that although it may have been reasonable to speculate from this evidence that petitioner acted as a lookout, a rational jury could not find it to be proof beyond a reasonable doubt that the petitioner aided and abetted in the offense, where there was no evidence that the petitioner intended to burn the victims' home and the evidence that he knew

that this other individual planned to burn it was "simply too meager" to support his conviction. *Id.* at 424.

Likewise, in *Hopson v. Foltz,* 818 F. 2d 866 (Table); 1987 WL 37432, * 2 (6th Cir. May 20, 1987), the Sixth Circuit granted a writ of habeas corpus, finding that there was insufficient evidence for a jury to find beyond a reasonable doubt that the petitioner participated as an aider and abettor in the murder for which he was convicted. The testimony at most indicated that the petitioner in *Hopson* was present at the shooting, that he may have argued with the victim during the evening prior to the shooting, that he may have known that someone else intended to harm the victim, and that he may have taken the empty shell casings after the shooting. However, there was no proof that the petitioner "acted in pre-concert" with the shooter to commit the murder or that he said or did anything to 'support, encourage, or incite the commission of the crime." *Id*

In *Brown v. Palmer, supra*, the Sixth Circuit indicated that although *Fuller* and *Hopson* were pre-AEDPA [Antiterrorism and Effective Death Penalty Act] cases, "[t]heir holdings that distinguish reasonable speculation from sufficient evidence are still persuasive in establishing that the state court's application of federal constitutional law as set forth in *Jackson*, was objectively unreasonable." *Brown*, 441 F. 3d at 352.

In the present case, without impermissibly stacking inferences, there is insufficient evidence for a rational trier of fact to conclude that petitioner participated in the victim's murder. *See Kelly v. Roberts,* 998 F. 2d 802, 808-09 (10th Cir. 1993). "[A]lthough a jury may infer facts from other facts that are established by inference, each link in the chain of

inferences must be sufficiently strong to avoid a lapse into speculation." *Piaskowski v. Bett,* 256 F. 3d 687, 693 (7th Cir. 2001)(granting habeas relief where there was insufficient evidence that the petitioner participated in first- degree murder for which he was convicted). In this case, the chain of inferences that the prosecution attempted to forge fails in many places. *Id.*

The main evidence against petitioner was the fact that his Ruger 9 mm. handgun was apparently used as one of the murder weapons. However, no witnesses observed petitioner in possession of this firearm just before or after the murder. Petitioner's fingerprints were not recovered from this weapon or the 9 mm casings recovered in this case either.

The importance of the contents of the gym bag discovered by Wise and DeWolfe some thirty two hours after the murder is also questionable. The twelve gauge shotgun found inside the bag could not be conclusively linked to the shooting. None of the items in the gym bag contained petitioner's fingerprints. The Michigan Court of Appeals overemphasized the strength of some of the evidence recovered from the gym bag. Contrary to their finding, there was never a positive match between the human hair found in the gym bag and the human hair taken from petitioner. Further, the dog hair recovered from the gym bag and the dog hair recovered from petitioner's house could not be conclusively matched. In fact, the witness could not even tell what breed of dog was the source of the hair. The witness testified that the best he could determine was that these hairs were similar, but he could not state with certainty that the hairs were the same. He could only state that the twine found in the gym bag was similar to twine recovered at petitioner's house, but he, too, was unable to conclude that the twine was the same. There was nothing unique about

the twine. He was also unable to determine whether the hacksaw found at petitioner's house had been used to cut the shotgun found in this gym bag as well.

The Michigan Court of Appeals also placed great importance on the fact that the victim had made a "pass" at petitioner's girlfriend and that petitioner was jealous and possessive. However, the Michigan Court of Appeals completely ignored Nancy Leat's testimony that petitioner was not possessive and jealous and that he had no reaction whatsoever when the victim made this "pass" at her.

The Michigan Court of Appeals also stressed the fact that petitioner had asked a friend, presumably Mueth, for the names of drug dealers whom he could rob. The Michigan Court of Appeals, however, ignored Mueth's testimony that petitioner was interested in taking the dealers' money when they were away from home, thus, undercutting the prosecutor's theory that petitioner had intended on robbing and killing the victim.

Lastly, the Michigan Court of Appeals mentioned that petitioner's girlfriend "may have" asked others to buttress petitioner's alibi defense. Proof of fabrication of an alibi may be some affirmative evidence of guilt but standing alone would be insufficient to support a conviction. *See United States v. Ford,* 237 F. 2d 57, 63, n. 10 (2nd Cir. 1956); *vacated as moot*, 355 U.S. 38 (1957). In this case, there was no evidence presented that petitioner himself asked witnesses to fabricate an alibi defense for him. Any evidence that his girlfriend "may have" asked witnesses to buttress petitioner's alibi is simply too tenuous to support an inference that petitioner participated in this murder.

In this case, the "meager circumstantial evidence" is simply too weak to convict petitioner of

these crimes, particularly since much of it is "conjecture camouflaged as evidence." *Piaskowski*, 256 F. 3d at 693. The evidence is insufficient to support petitioner's conviction for second-degree murder and felony-firearm, because none of the evidence put petitioner at the scene of the murder. *See Cooper v. McGrath*, 314 F. Supp. 2d 967, 996-97 (N.D. Cal. 2004). In addition to the fact that there were no eyewitnesses to this crime, there were no fingerprints recovered from the crime scene or from the gym bag that would link petitioner to the murder. None of the victim's blood was ever recovered from petitioner's boots, shoes, his automobile, or the gym bag.

The Michigan Court of Appeals also ignored the fact that petitioner's size 11 footwear did not match the size 6-9 footprints found at the crime scene or where the gym bag was discovered. No motive was conclusively established. There was no evidence that petitioner ever made any threats to kill the victim. While the evidence may have lead to speculation that petitioner committed this murder, there is insufficient evidence to prove beyond a reasonable doubt that petitioner committed this murder.[2]

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[2] Indeed, as petitioner's counsel points out, the prosecutor acknowledged at the conclusion of the preliminary examination that "certainly... the possibility exists that somebody else may have been involved in this...homicide rather than the defendant. Certainly." (Prelim. I pp. 9-10). The prosecutor also conceded in closing argument that petitioner may not have been responsible for the shooting, stating,

> "There is evidence in this case that there was more than one person involved in this. There is evidence that there were walkie-talkies....You could find, based on this evidence, that one person shot...

The Michigan Court of Appeals' conclusion that the evidence was sufficient to convict petitioner is contrary to, or an unreasonable application of, *Jackson v. Virginia*. Petitioner is therefore entitled to habeas relief. Because this Court finds that the state has failed to meet its burden of proof, the appropriate remedy is to issue a writ of habeas corpus outright, rather than conditioning the grant of the writ on the state's failure to retry the petitioner. *See Brown v. Palmer*, 358 F. Supp. 2d 648, 656 (E.D. Mich. 2005).

The petition for writ of habeas corpus is hereby granted with respect to petitioner's insufficiency of evidence claim and the Court orders that petitioner's convictions for second-degree murder and felony-firearm be vacated. Because the Court is granting petitioner a writ of habeas corpus on his first claim, the Court will only briefly address petitioner's remaining claims. *See Brown*, 358 F. Supp. 2d at 656.

B. Claim # 2. The ineffective assistance of counsel claim.

Petitioner next claims that defense counsel was ineffective for failing to move for a directed verdict at the conclusion of the prosecutor's opening statement, because the prosecutor failed to refer to evidence in his

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> Harry Chappalear....You could conclude, I suppose, on this evidence that there were two people who went in. [T VIII(b), pp. 53- 54).

As petitioner's counsel aptly notes "The prosecution's own uncertainty illustrates just how questionable the evidence in this case was." See Petitioner's Supplemental Brief in Support of Petition For Writ of Habeas Corpus, p. 14, n. 4.

opening statement that would establish petitioner's involvement in the murder.

The Michigan Court of Appeals rejected petitioner's claim on several grounds. First, a motion for directed verdict may not be brought until the prosecution has completed its case-in-chief. *Newman, Slip. Op.* at * 3 (citing M.C.R. 6.419). Secondly, the Michigan Court of Appeals concluded that the prosecution's opening remarks adequately explained the general nature of the case and the ultimate facts that it proposed to present that were essential to proving petitioner's intent and involvement in the murder. *Id.*

To show that he was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* Second, the defendant must show that such performance prejudiced his defense. *Id.*

As an initial matter, it is unclear whether a defendant in Michigan can seek a motion for a directed verdict based upon a prosecutor's deficient opening statements. M.C.R. 6.419 states that: "[A]fter the prosecutor has rested the prosecution's case-in-chief and before the defendant presents proofs", a trial court may direct a verdict of acquittal if the evidence is insufficient as a matter of law. However, the Michigan Court of Appeals has held that a trial court in a bench trial could properly dismiss criminal charges before

hearing any evidence if the prosecutor admits in his opening statement that the evidence would be insufficient to prove the defendant's guilt beyond a reasonable doubt. *See Matter of Ferguson,* 78 Mich. App. 576, 578-79; 261 N.W. 2d 8 (1977). The Michigan Court of Appeals did admonish trial courts that:

> "[t]he practice of immediate dismissal after opening argument should be used sparingly and only after careful judicial consideration." *Id.* at p. 579.
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> The Michigan Court of Appeals further stated that it:
> "would discourage the use of such dismissals where a jury has been called. In criminal cases, the province and powers of the jury as the conscience of the community should rarely, if ever, be usurped by the trial court."
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> *Id.* at 579-80.

Even assuming that a defendant in Michigan could move for a directed verdict at the conclusion of the prosecutor's opening statements, petitioner has failed to show that his counsel was ineffective for failing to do so. In light of the Michigan Court of Appeals' admonitions in *Ferguson*, it is doubtful that the trial court would have granted a directed verdict in this case prior to hearing any evidence. Secondly, trial counsel did move for a directed verdict at the conclusion of the prosecution's case, which was granted in part. Petitioner has failed to show how he was prejudiced by counsel's failure to move for a directed verdict at the conclusion of the prosecutor's opening statements rather than at the conclusion of the case-in-chief. In any event, petitioner's second claim is academic in light of the fact that this Court is

granting habeas relief on his sufficiency of evidence claim.

C. Claim # 3. The Double Jeopardy Clause Claim.

In his third claim, petitioner contends that the trial court violated the Double Jeopardy Clause by reconsidering its decision to direct a verdict on the first-degree murder charge. The Michigan Court of Appeals rejected petitioner's claim, because the first-degree murder conviction was vacated on remand and petitioner was convicted and sentenced on the lesser included offense of second-degree murder. *Newman, Slip. Op.* at * 3. The Michigan Court of Appeals further concluded that petitioner was not prejudiced by the erroneous submission of the first-degree murder charge to the jury, because the primary issue in the trial was whether petitioner participated in the murder. *Id.*

When a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense. *See Morris v. Mathews*, 475 U.S. 237, 246-47 (1986).

In the present case, petitioner has failed to show a reasonable probability that he would not have been convicted of second-degree murder absent the submission of the first-degree premeditated murder charge to the jurors. The main issue in petitioner's trial was whether petitioner was involved in the murder of the victim, either as the principal or as an accessory, not whether the shooting was premeditated or unpremeditated. Because petitioner has failed to

show that he was prejudiced by the wrongful submission of the first-degree murder conviction to the jury, the reduction of petitioner's first-degree murder conviction to second-degree murder was an adequate remedy for the Double Jeopardy violation. *Morris*, 475 U.S. at 245-48. In addition, the Double Jeopardy Clause violation has been mooted by virtue of this Court's granting of habeas relief on petitioner's first claim.

D. Claim #4. The prosecutorial misconduct claims.

Petitioner next claims that the prosecutor committed misconduct by bringing charges against petitioner without probable cause, by misleading the trial court into believing that a directed verdict of acquittal could be reversed, and by making false statements about petitioner's alibi defense.

Petitioner's primary claim is that the prosecutor brought criminal charges against petitioner when there was no evidence to establish that petitioner participated in the victim's murder. This Court agrees with petitioner that there was insufficient evidence to charge, or to convict, petitioner. Because this prosecutorial misconduct claim is substantially identical to the sufficiency of evidence claim for which this Court is granting relief, this portion of petitioner's prosecutorial misconduct claim is moot. *See e.g. Schledwitz v. United States*, 169 F. 3d 1003, 1017, n. 8 (6th Cir. 1999). In addition, because petitioner's second prosecutorial misconduct claim is essentially identical to petitioner's Double Jeopardy claim, the Court rejects this claim for the same reason that it rejected petitioner's third claim.

Petitioner's remaining prosecutorial misconduct claim is that the prosecutor mischaracterized

petitioner's alibi defense in his closing argument, by misleading jurors into thinking that alibi witnesses recalled petitioner being with them in a bar nine days after his arrest.

The actions of a prosecutor in misrepresenting facts in evidence can amount to substantial error, because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Washington v. Hofbauer,* 228 F. 3d 689, 700 (6th Cir. 2000)(*quoting Donnelly v. DeChristoforo,* 416 U.S. 637, 646 (1974)). In addition, asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way. *Id.* However, prosecutors must be given leeway to argue reasonable inferences from the evidence. *Byrd v. Collins*, 209 F. 3d 486, 535 (6th Cir. 2000).

In the present case, there was some evidence that petitioner's alibi witness, Jeannie McCormick, may have been confused or mistaken about the date that she went north to visit her mother. McCormick had testified at the preliminary examination that petitioner was at the bar where she worked on the night of the murder, because she went to visit her mother the next day, February 28, 1992. However, at trial, McCormick believed that she may have visited her mother, Violet Jeffries, prior to February 28, 1992. Jeffries testified that McCormick visited her at the end of January of 1992 and again visited her on March 28th.

The prosecutor's comments were not improper, because they were a fair comment upon McCormick's confusion about when she went to visit her mother. Petitioner is therefore not entitled to habeas relief on this claim.

E. Claim #5. The sentencing claim.

Petitioner next claims that he was deprived of the right to a fair sentencing, the right to present a defense, the right to the effective assistance of counsel, and the right to a meaningful appeal of right when the trial court refused to consider any mitigating evidence offered on petitioner's behalf at the re-sentencing after the original first- degree murder conviction was vacated.

Prior to the-sentencing, petitioner's counsel had filed a sentencing memorandum, which raised a number of arguments in support of mitigating petitioner's sentence. However, they addressed the sufficiency of the evidence, rather than sentencing factors.

None of these defenses or issues were ever addressed by the trial court at re sentencing. The trial court merely stated:

> "[y]ou have put it in writing matters that I believe you intend to address...in the [Michigan] Court of Appeals. There are many things in your documentation here. I would says it's certainly 50 pages if not several hundred pages of documentation in all that you have submitted here, and that will go...before the [Michigan] Court of Appeals..." (Resentencing T., pp. 22-23).

The trial court went on to state:

> "I'm trying to focus now on the sentencing in this matter which is what you're here for today. (*Id.* at p 23).

The trial court limited sentencing objections to the Sentencing Guidelines and pre-sentence report inaccuracies as "they were raised orally to this Court here." (*Id.* at p. 24). Defense counsel objected to the trial court not specifically addressing the sentencing defenses and issues, but the trial court replied "I don't know that I am required to make findings of fact as part of... a sentencing memorandum." (*Id.* at pp. 25-26). These issues were related to the sufficiency of evidence. Petitioner was offered a chance of allocution. Therefore, the trial court was correct that petitioner had "a fundamental misunderstanding as to what [sentencing] mitigation entails." (*Id.* at p. 52). Petitioner is not entitled to habeas relief on this claim.

F. Claims # 6, 7, and 8. The post-conviction claims.

Petitioner lastly alleges various defects in how his post-conviction motion was handled by the state trial and appellate courts. A federal habeas corpus petition cannot be used to mount a challenge to a state's scheme of post-conviction relief. *Greer v. Mitchell,* 264 F. 3d 663, 681 (6th Cir. 2001). States have no constitutional obligation to provide post-conviction remedies. *Id.* Any error in the application of Michigan's post-conviction statute is an error of state law that would not be cognizable in federal habeas review. *See Simpson v. Jones,* 238 F. 3d 399, 406-407 (6th Cir. 2000).

IV. ORDER

IT IS HEREBY ORDERED THAT PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS IS UNCONDITIONALLY GRANTED. PETITIONER'S CONVICTIONS FOR SECOND-DEGREE MURDER AND FELONY-FIREARM ARE ORDERED TO BE VACATED AND

SET ASIDE. RESPONDENT IS ORDERED TO RELEASE PETITIONER FROM CUSTODY.

s/Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

Dated: June 15, 2007

I hereby certify that a copy of the foregoing document was served upon parties/counsel of record on June 15, 2007, by electronic and/or ordinary mail.

s/Catherine A. Pickles
Judicial Secretary

Order

Michigan Supreme Court
Entered: March 28, 2000 Lansing, Michigan

115592

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 115592
COA: 165208

DANIEL ALBERT NEWMAN,

Livingston CC: 92-007032--FC

Defendant-Appellant.

_____/

On order of the Court, the a for leave to appeal from the July 2, 1999 decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, C of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 28, 2000 s/Corbin R. Davis

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DANIEL ALBERT NEWMAN, Defendant-Appellant.	UNPUBLISHED July 2, 1999 No. 165208 Livingston Circuit Court LC No. 92-7032 FC

Before: Griffm, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and first-degree murder; MCL 750.316; MSA 28.548, for which he received consecutive sentences of two years and mandatory life imprisonment, respectively. Defendant appealed his convictions and sentences to this Court as of right. Defendant subsequently filed a motion to remand pursuant to MCR 7.211(C)(1)(b), based on a certification by the trial court that it would vacate the first-degree murder conviction and enter judgment on, and resentence defendant for, second-degree murder, MCL 750.317; MSA 28.549. This Court, while retaining jurisdiction, granted the motion. On remand, the trial court vacated the first-degree murder conviction and entered a judgment of conviction for second-degree murder, reaffirmed defendant's previous conviction and sentence for felony-firearm, and sentenced defendant on the

second-degree murder conviction to a term of forty to eighty years' imprisonment. We now affirm defendant's convictions and sentences for second-degree murder and felony-firearm.

The evidence established that the victim, Harry Chappelear, died at his home on or about February 28, 1992, after receiving two shotgun wounds and eight other gunshot wounds to his head, chest, abdomen and arms. It was the prosecutor's theory at trial that Chappelear, a drug dealer, was shot and killed during a robbery of his home and that defendant participated in Chappelear's killing, either as a principal or an accomplice. Defendant presented an alibi defense.

I

Defendant first claims that the evidence was insufficient to establish beyond a reasonable doubt that he was present to cause the death of the victim or that he shared a preconceived intent to kill the victim. We note that while defendant's original brief was addressed to the first-degree murder conviction, his reply brief recognizes that the conviction was modified on remand and enumerates the elements of second-degree murder.

Viewing the evidence in a light most favorable to the prosecution, *People v Hampton,* 407 Mich 354, 358; 285 NW2d 284 (1979), we conclude that a rational trier of fact could have found beyond a reasonable doubt (1) that there was a death, (2) that defendant's acts were a contributory cause that were a substantial factor in producing the death, (3) that circumstances of justification, excuse, or mitigation did not exist, and (4) that defendant's acts were done with the intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the acts probably would cause death or great

bodily harm. *People v Welch,* 226 Mich App 461, 462-463; 574 NW2d 682 (1997). See also *People v Bailey,* 451 Mich 657, 669; 549 NW2d 325 (1996). The fact that no eyewitness were able to place defendant at the scene of the murder is not dispositive. Circumstantial evidence and reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand),* 218 Mich App 325, 337; 553 NW2d 692 (1996).

Here, there was evidence that one of the murder weapons belonged to defendant. While defendant asserts that this evidence is of little relevance because the gun was purchased five months before the murder, defendant was the last known purchaser of the gun, and a witness testified she saw a similar-looking gun at defendant's residence a week or two before the murder. Further, the gun was found in an abandoned gym bag that also contained a blue jean jacket, a sawed-off shotgun with tape on it, a ski mask, gloves, and a set of walkie-talkies. Hair found on the ski mask matched defendant's hair when microscopically compared, and hair similar to the hair of one of defendant's dogs was also found on the ski mask. Tape similar to the tape on the shotgun was found at defendant's residence, a substance found on the blue jean jacket appeared to contain the same elements as drywall compound used by defendant, who was a drywaller, and twine found on the gym bag was similar to twine found at defendant's residence. Further, there was testimony that defendant knew the victim and had been to the victim's home, that the victim had made a pass at defendant's girlfriend in defendant's presence, and that defendant was jealous and possessive. There was also evidence that defendant had repeatedly asked a friend for the names of any drug dealers he could rob for drugs or money. Lastly, it appeared that defendant's girlfriend may

have been asking others to buttress defendant's alibi defense.

We conclude that when viewed in a light most favorable to the prosecution, the evidence could support an inference beyond an reasonable doubt that defendant either committed the murder himself or aided and abetted in its commission. Moreover, it was unnecessary for the prosecutor to negate every reasonable theory consistent with defendant's innocence. Rather, the prosecutor needed only to prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provided. *People v Daoust,* 228 Mich App 1, 16; 557 NW2d 179 (1998). The prosecutor sustained this burden.

II

Defendant next claims that he was entitled to a directed verdict of acquittal after the prosecutor's opening statement because the prosecutor neglected to refer to evidence that would be presented to establish defendant's presence and intent, and that trial counsel was ineffective for failing to move for dismissal. We disagree. Defendant's assertion that defense counsel could have moved for and been granted a directed verdict of acquittal at the end of the prosecutor's opening statement is without merit. First, a motion for directed verdict may not be brought until the prosecution has rested its case in chief, MCR 6.419. Second, the prosecution's opening statement was adequate when the prosecutor explained the general nature of the case and the ultimate facts it proposed to present that were essential to proving defendant's participation in the killing of the victim, either as a principal or as an aider and abettor. MCR 6.414(B).

III

In his initial brief on appeal, defendant's third argument was addressed to an alleged double jeopardy violation stemming from the trial court's reconsideration of its ruling on defendant's motion for directed verdict on the first-degree murder charge. On remand, the first-degree murder conviction was vacated and defendant was convicted of and sentence for second-degree murder. In his reply brief, defendant argues that the improper submission of the first-degree charge to the jury "unfocused their attention to the key element at issue: was [defendant] present to cause the death, or was [defendant] present and shared a preconceived intent to kill." Defendant argues that submission of the first-degree charge misled the jury as to the key elements in dispute. We disagree. Clearly, the question whether the physical evidence found in the bag and the other circumstantial evidence was sufficient to establish defendant's participation in the murder beyond a reasonable doubt was the key question for the jury regardless of the degree of murder considered. We do not agree that there is a reasonable probability that submission of the first-degree charge prejudiced defendant in that he would not have been convicted of second-degree murder had the greater charge not been submitted. Thus, defendant has already been accorded all appropriate relief for the alleged double jeopardy violation, and he is not entitle to retrial of the second-degree charge.

IV

Finally, defendant argues that he was denied a fair trial by various instances of prosecutorial misconduct, including claims relating to the charges on which he was bound over, the prosecutor's motion for immediate reconsideration of the trial court's

initial ruling on the directed verdict motion, and the prosecutor's comments during closing argument regarding defendant's alibi defense. Because defendant failed to timely and specifically object below to the claimed misconduct now asserted on appeal, our review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We are convinced that a miscarriage of justice will not result in this case, and our review of the record reveals no misconduct on the part of the prosecutor that denied defendant a fair trial. *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). We reject defendant's arguments that the prosecutor mislead the court or the jury.

V

After the initial remand, defendant filed a motion to add issues and remand, which was denied by this Court "for failure to persuade of the need for remand at this time." We have again reviewed defendant's motion and we are satisfied that the motion raises no meritorious issues.

Defendant's convictions and sentences for second-degree murder and felony-firearm are affirmed.

/s/ Richard A. Griffin
/s/ Gary R. McDonald
/s/ Helene N. White